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Same-Sex Marriage and the Right to Privacy

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I. Introduction

Over the past decade, several state appellate courts have analyzed whether their respective state constitutions protect the right to marry a same-sex partner. Those courts addressing the issue have differed both in their analyses and in their ultimate conclusions, although there have been striking similarities among those courts upholding same-sex marriage bans and among those striking them down, differences in wording among the respective state constitutional provisions notwithstanding.

To understand the widely differing analyses regarding the right to marry someone of the same sex, it will be helpful to consider some of the background law regarding the right to marry in particular or the right to privacy more generally. The United States Supreme Court has recognized that certain rights related to family matters are extremely important and cannot be abridged by the state absent a showing that compelling state interests would be undermined were those rights respected. A matter of some dispute involves the criteria used by the Court to determine which rights qualify for this heightened protection and how the scope of those rights should be defined.

The cases discussed here have all been decided on state constitutional grounds,1 and it is of course true that state constitutions differ both in their wording and in the degree of protection that they offer. Further, state constitutions have differing equal protection guarantees on the basis of sexual orientation,2 which would affect analyses of whether the right to marry a same-sex partner is protected by the state constitution. However, the focus of this article is neither on the particular wording of the privacy guarantees in the state constitutions nor on the equality guarantees contained in those constitutions but, instead, on the privacy or substantive due process analyses offered by the differing courts.

Part II of this article examines the background right to privacy jurisprudence contained in the United States Constitution, discussing those rights that have been designated as protected and why the existing federal

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1 A case is winding its way through the courts challenging California’s same-sex marriage ban on federal constitutional grounds. See Valerie Richardson, Prop 8 Trial Stirs up Questions, Emotions, Gay-Marriage Allies Optimistic, Wash. Times, Feb. 8, 2010, at A01 (discussing Perry v. Schwarzenegger, which addresses “the federal constitutionality of California’s Proposition 8”).

2 See, for example, Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 412 (Conn. 2008) (“sexual orientation constitutes a quasi-suspect classification for purposes of the equal protection provisions of the state constitution”).
jurisprudence cannot plausibly be construed as affording same-sex marriage no constitutional protection. Part III discusses several of the state appellate court analyses of the right to marry that have been offered since Lawrence v. Texas\(^3\) was decided, noting how several courts upholding the respective bans have offered specious or irrelevant reasons that would never have been offered in any other context. The article concludes that all of these opinions help demonstrate why the right to marry a same-sex partner should be found protected as a matter of both state and federal due process guarantees.

I. Privacy Rights under the United States Constitution

The United States Supreme Court has recognized that several rights related to family fall within the right to privacy and are accorded significant constitutional protection. It is a matter of some dispute, however, which rights do or should fall within the contours of the right to privacy and, further, how narrowly those rights should be defined. Yet, it is not as if there are no guidelines on this matter—the existing jurisprudence suggests both that a commonly used test for determining which rights are fundamental should not be used and that the traditional prioritizing within the right to privacy would have to be turned on its head for same-sex marriage not to be recognized as protected under the right to privacy.

A. The United States Constitution and the Right to Privacy

The United States Supreme Court has recognized that certain rights fall within the right to privacy including marriage, procreation, contraception, family relationships, and child rearing and education.\(^4\) Such a designation is important, because statutes abridging privacy rights will be struck down as unconstitutional unless meeting a very demanding standard. As the plurality explained in Planned Parenthood of Southeastern Pennsylvania v. Casey,\(^5\) “The Court has held that limitations on the right of privacy are permissible only if they survive ‘strict’ constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest.”\(^6\) In contrast, if an interest does not fall within the right to privacy and is, instead, a mere liberty interest, then a statute adversely

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\(^3\) 539 U.S. 558 (2003).
\(^6\) Id. at 929.
affecting that interest will be upheld as long as that statute is rationally related to the promotion of a legitimate state interest.\(^7\)

Given the importance of how rights are characterized, one might expect that there would be a clear test to determine which rights are fundamental and which not. The Court explained in *Washington v. Glucksberg*\(^8\) that the “Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’, . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”\(^9\) While the statement is accurate insofar as it is describing some of the rights that are protected, a separate question is whether the Due Process Clause offers robust protection for only those rights falling within the description offered by the *Glucksberg* Court.

The *Glucksberg* test, which is frequently cited in analyses holding that a particular right does not merit increased protection,\(^10\) is clear and very demanding. Very few rights evaluated in light of this test qualify as fundamental. Such a result might be thought unsurprising—if fundamental rights cannot be abridged unless very important state interests would otherwise be at risk, one might expect that the list of such rights would have to be relatively short if only because legislatures might otherwise be hamstrung in their attempts to regulate everyday affairs.

Reasonable people might disagree about whether the constitutional test to determine fundamental rights should err on the side of giving states more discretion for fear that legislatures would otherwise be straitjacketed, or less discretion for fear that legislatures would otherwise run roughshod over very important rights. Yet, regardless of whether one believes that public policy is better served by protecting the individual or, instead, giving legislatures freer rein to promote the public good, a separate consideration is that any test for fundamental rights should account both for those rights that have been recognized as fundamental and for those that have not. The difficulty with the history and traditions test is that it performs its gate-keeping function too well--many of the rights currently recognized as falling within the right to privacy could neither be described as deeply rooted in this nation’s history

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\(^7\) See, for example, *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (“the asserted ‘right’ . . . is not a fundamental liberty interest protected by the Due Process Clause, [which means that the statute adversely affecting that interest must merely] be rationally related to legitimate government interests”).

\(^8\) See id. at 721.

\(^9\) Id. at 720-21 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

\(^10\) See, for example, *Conaway v. Deane*, 932 A.2d 571, 617 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 976 (Wash. 2006).
and tradition nor as implicit in the concept of ordered liberty such that neither liberty nor justice would exist were those rights not recognized.

Consider, for example, the right to access contraception. Laws had been on the books for 85 years criminalizing contraception at the time that the Court found contraception for married couples protected by the Constitution, and had been on the books for an even longer period when the Court found contraception for unmarried persons to be constitutionally protected. Yet, a practice that had been criminalized for several decades could hardly be said to be deeply rooted in the Nation’s history and traditions or implicit in the concept of ordered liberty such that neither liberty nor justice would exist were the right not recognized. Historical prohibitions notwithstanding, the statue banning access to contraception for unmarried individuals was struck down as unconstitutional, and the right to access contraception is considered a fundamental right falling within the right to privacy.

The same point might be made about the right to abortion, which had been criminalized for over a century before it was found to be protected by the right to privacy. Here, too, a right recognized as falling within the right to privacy involved a practice long criminalized. Indeed, the Roe Court suggested that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.” By using “or” rather than “and,” Roe suggests that it is mistaken to believe that “fundamental” is appropriately defined in terms of what is implicit in the concept of ordered liberty. Instead, a right falling under privacy protections will be fundamental (where that term is defined independently) or implicit in the concept of ordered liberty.

One final illustration might be offered to establish why the history and traditions test is simply not the

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13 See Lawrence, 539 U.S. 596 (Scalia, J., dissenting) (suggesting that something historically criminalized cannot be deeply rooted in the Nation’s history and traditions).
14 See Glucksberg, 521 U.S. at 726.
15 See Roe, 410 U.S. at 174-77 (Rehnquist, J., dissenting).
16 Id. at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).
17 Id. at 152 (italics added).
correct test. Consider the right to marry someone of a different race. Anti-miscegenation statutes had existed since before the nation’s founding, so it could hardly be thought that such a right was protected by the Nation’s history and traditions. Further, when holding that the right to marry someone of another race was protected by the right to privacy, the Court nowhere claimed or even implied that neither liberty nor justice existed in the several states prohibiting interracial unions.

It might be thought that the reason that the right to marry someone of another race is protected is that the right analyzed by the Court was not described with such specificity—the right to marry as a general matter is deeply rooted in this Nation’s history and traditions, even if the right to marry someone of another race is not. Yet, the same point might be made about the right to marry someone of the same sex. The right to marry as a general matter is deeply rooted in this Nation’s history and traditions, even if the right to marry someone of the same sex is not. In any event, the Loving Court refused to address the correct level of specificity when holding that the right to marry someone of another race was protected. It was only after the Court had already recognized various rights including rights to contraception, abortion, and the right to marry someone of another race that the Glucksberg Court suggested that there must be “a ‘careful description’ of the asserted fundamental liberty interest” whenever a particular right is claimed to be fundamental. Had the right to marry someone of another race been carefully described, it could not have passed the history and traditions test.

There is no small irony in the Glucksberg Court’s claim that the relevant interest had to be carefully described. Consider the case cited by the Court for the proposition that the fundamental rights must be deeply rooted in this Nation’s history and tradition, namely, Moore v. City of East Cleveland, where the issue at hand was whether the City of East Cleveland was violating constitutional guarantees when defining family for zoning

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18 See Loving v. Virginia, 388 U.S. 1, 6 (1967).
19 For a list of those states, see id. at 6 n.5 (listing 15 states in addition to Virginia: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and West Virginia). The court noted that in the previous 15 years 14 states had repealed interracial bans: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. See id. n.5.
20 Chief Justice Poritz made this point in her Lewis concurrence and dissent. See Lewis v. Harris, 908 A.2d 196, 228 (N.J. 2006) (Poritz, C.J., concurring and dissenting).
21 Glucksberg, 521 U.S. at 721.
22 Id. at 720-21 (1997) (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).
purposes in such a way that a grandmother was not permitted to live with her two grandsons who were first cousins rather than brothers.\textsuperscript{24}

Certainly, the \textit{Glucksberg} Court was not guilty of misquotation--the \textit{Moore} plurality in fact suggested that the “institution of the family is deeply rooted in this Nation's history and tradition.”\textsuperscript{25} Yet, members of the LGBT (lesbian, gay, bisexual and transgender) community can point to the \textit{Moore} Court’s recognition of the central importance of family as a reason to recognize LGBT families, whether or not those families include children.\textsuperscript{26} This is where the \textit{Glucksberg} Court’s point about careful description can allegedly be used to suggest that while the institution of family may be deeply rooted in the Nation’s history and traditions, the institution of LGBT families is not. However, were the careful description test used in \textit{Moore}, the very case cited with approval in \textit{Glucksberg}, the Court would likely have reached the opposite result. As Justice White suggested in his \textit{Moore} dissent, “Under our cases, the Due Process Clause extends substantial protection to various phases of family life, but none requires that the . . . interest in residing with more than one set of grandchildren is one that calls for any kind of heightened protection under the Due Process Clause.”\textsuperscript{27} Thus, one of the very cases cited by the \textit{Glucksberg} Court to establish the relevant test would likely have been decided differently had the Court actually used the test that \textit{Moore} allegedly epitomizes.

The history and traditions test, especially when requiring a careful description of the interest asserted to be fundamental, provides an extremely effective bulwark against courts recognizing that interests have or deserve robust constitutional protection, although that test’s very effectiveness counsels against its being helpful for determining which rights are fundamental and which not. Indeed, it should be noted that the “implicit in the concept of ordered liberty” test comes from \textit{Palko v. Connecticut}.\textsuperscript{28} where the Court offered a catalog of those rights in the criminal context which would not qualify under the applicable test as being fundamental including the right to a trial

\textsuperscript{24} See \textit{id.} at 496.
\textsuperscript{25} \textit{Id.} at 523.
\textsuperscript{26} See Danielle Epstein, Lena Mukherjee, \textit{Note, Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit}, 12 \textit{St. John’s J. Legal Comment}, 782, 798 n. 91 (1997) (suggesting that \textit{Moore}’s boundary expansion beyond the nuclear family supports recognizing LGBT families); Julienne C. Scocca, \textit{Comment, Society's Ban on Same-Sex Marriages: A Reevaluation of the So-Called “Fundamental Right” of Marriage}, 2 \textit{Seton Hall Const. L.J.}, 719, 764 & n. 263 (suggesting that \textit{Moore} lends support to recognizing nontraditional families including LGBT families).
\textsuperscript{27} \textit{Moore}, 431 U.S. at 549 (White, J., dissenting).
\textsuperscript{28} 302 U.S. 319 (1937).
by jury, and the right against compulsory self-incrimination, and the right not to be subjected to double jeopardy. Needless to say, all of these rights are now viewed as fundamental.

B. The Federally Protected Right to Marry

The right of privacy is understood to protect the right to marry, and it would be helpful to examine the cases in which the Court developed this jurisprudence. The Court first recognized that the right to marry was protected by the Due Process Clause in Loving v. Virginia, where Virginia’s anti-miscegenation statute was held to violate both equal protection and due process guarantees.

The Due Process analysis was surprisingly underdeveloped in that case. The Court observed that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,” a description that might be made of individuals regardless of their orientation. The Court noted that marriage “is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival,” and then explained that to “deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law.”

The Court concluded its analysis by suggesting that the “freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”

This analysis needs to be unpacked. For example, the Court fails to explain why marriage is fundamental to our very existence and survival. There could be a number of reasons ranging from the kinds of benefits that marriage provides to those in the relationship to the kinds of benefits that marriage provides to those children who might be

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29 Id. at 325.
30 Id...
31 Palko held that the right against double jeopardy was not fundamental, see id. at 328, a holding that was overruled. See Benton v. Maryland, 395 U.S. 784 (1969).
33 See Loving, 388 U.S. at 12 (1967) (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”); id. (“To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.”).
34 Id.
35 Id.
36 Id.
37 Id.
brought up within that setting including their being taught important societal values\textsuperscript{38} to other kinds of societal benefits, e.g., alleged domesticating effects of marriage on individuals who might otherwise be “wild” singles.\textsuperscript{39}

The Court’s suggesting that marriage is fundamental to the existence and survival of humankind might be thought to be saying something about future generations, although the \textit{Loving} Court nowhere expressly discusses children in the opinion and only obliquely mentions them in the discussion of the state’s justifications for its anti-miscegenation statutes.\textsuperscript{40} The Court noted that in \textit{Naim v. Naim}\textsuperscript{41} the Virginia Supreme Court had approvingly announced that “the State's legitimate purposes were ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride.’”\textsuperscript{42} When eschewing the desirability of having “mongrel citizens,” Virginia was invoking one of the arguments that had long been made with respect to why interracial marriages should not be allowed, namely, that the children of such marriages were allegedly inferior to the children produced when the couples were composed of individuals of the same race.\textsuperscript{43} The United States Supreme Court dismissed such purposes as an obvious “endorsement of the doctrine of White Supremacy.”\textsuperscript{44} Nonetheless, the Court was strikingly reluctant to discuss the role, if any, that children play in making the right to marry fundamental, perhaps because of a desire to shift the focus of the argument away from Virginia’s contention that the anti-miscegenation statutes should be upheld to promote the interests of children who, allegedly, would be inferior to their pure-race counterparts.

The Court was much less reticent about children when it again discussed the right to marry in \textit{Zablocki v. Redhail}.\textsuperscript{45} At issue was a Wisconsin statute making it very difficult for noncustodial parents to marry if they could not establish their ability to support those children for whom they were already legally responsible. Basically, the

\textsuperscript{38} See \textit{Zablocki v. Redhail}, 434 U.S. 374, 397 (1978) (Powell, J., concurring in the judgment) (“the Court has acknowledged the importance of the marriage relationship to the maintenance of values essential to organized society”).

\textsuperscript{39} See Susan Frelch Appleton, Toward a “Culturally Cliterate” Family Law? 23 \textit{Berkeley J. Gender L. & Just.} 267, 282 (2008) (discussing the claim that “marriage's purpose is to domesticate men”).

\textsuperscript{40} See \textit{Loving}, 388 U.S. at 7.

\textsuperscript{41} 87 S.E.2d 749 (Va. 1955).

\textsuperscript{42} \textit{Loving}, 388 U.S. at 7.

\textsuperscript{43} See \textit{Scott v. State}, 1869 WL 1667, *3 (Ga. 1869) (“The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.”).

\textsuperscript{44} \textit{Loving}, 388 U.S. at 7.

\textsuperscript{45} 434 U.S. 374 (1978).
state believed that if indigent, noncustodial parents were prevented from marrying, fewer children would be born to those parents and there would then be fewer children in need of public assistance.\textsuperscript{46}

The Zablocki Court explained that while the Loving Court had talked about the importance of the right to marry in the context of a challenge to a law banning interracial marriage, the "right to marry is of fundamental importance for all individuals."\textsuperscript{47} This time, however, the Court wanted to explain why the right to marry has such significance.

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.\textsuperscript{48}

A few points might be made about what constitutes family. First, it cannot plausibly be thought that the Court believed that children were only born into existing marriages. Roger Redhail had fathered a child out of wedlock while he was still in high school,\textsuperscript{49} and later had conceived a child with a different woman whom he wanted to marry.\textsuperscript{50} Regardless of his marital status, he was the father of one child and would soon be the father of another. The state’s refusal to permit him to marry his pregnant fiancé would not reduce the number of children produced but would instead simply increase the number of children not living in a marital home.

Nor can the Court plausibly be thought to be saying that legal as opposed to biological parenthood must occur in the context of marriage. That approach had already been rejected in Stanley v. Illinois,\textsuperscript{51} where the Court had recognized that unwed fathers have constitutionally protected rights.\textsuperscript{52}

\textsuperscript{46} Cf. id. at 375 (noting that the “statute specifies that court permission cannot be granted unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order ‘are not then and are not likely thereafter to become public charges’”).
\textsuperscript{47} Id. at 384.
\textsuperscript{48} Id. at 386.
\textsuperscript{49} Id. at 377-78.
\textsuperscript{50} Id. at 379 (“appellee and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time”).
\textsuperscript{51} 405 U.S. 645 (1972).
The **Zablocki** Court was suggesting that decisions related to: (1) procreation, (2) childbirth, (3) child rearing, and (4) family relationships are all on the same level of importance, and that each of these involves a constitutionally protected, fundamental interest. In addition, the Court was criticizing the state’s setting up barriers to the creation of legally recognized families without adequate justification.\(^{53}\)

When describing marriage as the foundation of family, the Court had at least two relationships in mind: the relationship between the adults, and the relationship between the parent(s) and child. The Court noted that the marital setting was the only context in which sexual relations could legally take place,\(^{54}\) referring to one of the important aspects of the relationship between the adults. Basically, it was still permissible at the time for a state to criminalize non-marital relations, and Wisconsin had a law making sexual relations between unmarried, consenting adults a misdemeanor.\(^{55}\)

Marriage is important to the adults in the relationship for other reasons as well, since it involves an expression of emotional support and public commitment,\(^{56}\) and may have religious significance for the parties.\(^{57}\) Further, it is a precondition for a variety of state or federal benefits.\(^{58}\) In short, marriage implicates a variety of interests of the adults in the relationship even when they have no ability or desire to have children.

Marriage is also important for those individuals who have or plan to have children, and the **Zablocki** Court pointed out that it made little sense to recognize the fundamental nature of the relationships between parents and their children while not permitting the parents to marry.\(^{59}\) Yet, members of the LGBT community are having and raising children, and those relationships both trigger constitutional protection

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52. **See** Caban v. Mohammed, 441 U.S. 380, 397 (1979) (“In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father.”) (citing **Stanley**).

53. **See** **Zablocki**, 434 U.S. at 388 (“We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained.”).

54. **Id.** at 386.

55. **Id.** at 386 n.11 (“Wisconsin punishes fornication as a criminal offense: ‘Whoever has sexual intercourse with a person not his spouse may be fined not more than $200 or imprisoned not more than 6 months or both.’ **Wis.Stat.** § 944.15 (1973).”).


57. **Id.** at 96.

58. **See id.**

59. **Zablocki**, 434 U.S. at 386.
and are of fundamental importance.\textsuperscript{60} It makes no more sense for states to deny same-sex couples the right to marry when they have children to raise than it did to deny Redhail the right to marry.

The Zablocki Court was careful to qualify its holding, noting that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."\textsuperscript{61} Thus, the Court was not precluding states from enacting any regulations regarding marriage. Nonetheless, where "a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."\textsuperscript{62} But any statute precluding an individual from marrying a same-sex partner is significantly interfering with that person’s ability to enter into such a relationship. A separate issue is whether the state has sufficiently important reasons to justify the prohibition, but same-sex marriage bans cannot plausibly be thought an insignificant stumbling block for members of the LGBT community wishing to marry a same-sex partner.

Consider, for example, how courts analyze the claim that polygamous marriage is protected by the Constitution. Rather than say that the Court did not have polygamous marriage in mind when recognizing that the Constitution protects the fundamental right to marry, courts instead analyze whether the state can meet the relevant burden to justify the prohibition.\textsuperscript{63}

Perhaps it would be argued that the Zablocki Court was not even considering members of the LGBT community when striking down the Wisconsin law at issue. Yet, Justice Powell noted in his concurrence that the Court’s analysis might have ramifications for same-sex relations and relationships as well.\textsuperscript{64}

The Court’s analysis of the fundamental right to marry suggests that a whole host of issues are implicated in marriage—the adults have a number of very important interests implicated, including their relationship with each other, sexual and otherwise, their ability to make a public statement about their relationship, their ability to fulfill


\textsuperscript{61} Zablocki, 434 U.S. at 386.

\textsuperscript{62} Id. at 388.

\textsuperscript{63} See, for example, Potter v. Murray City, 585 F. Supp. 1126, 1143 (C.D. Utah 1984) (discussing the state’s “compelling state interest in prohibiting polygamy”).

\textsuperscript{64} See id. at 399 (Powell, J., concurring in the judgment).
religious duties or aspirations, and their ability to receive a variety of benefits. Yet, a discussion of the adults’ relationship should not obscure the importance of marriage both for the children being raised and for the adults raising those children. Notwithstanding that all of these interests are implicated in families whether the parents are of the same sex or of different sexes, courts and commentators have somehow come to the conclusion that states are permitted to ban same-sex marriage.

c. Regulation of Sexual Activity

One of the perceived stumbling blocks to the recognition of same-sex marriage has been that up until 2003 when the Supreme Court overruled Bowers v. Hardwick, states had been permitted to criminalize same-sex sexual relations. In Bowers, the Court upheld a Georgia statute prohibiting sodomy, reasoning that there was no connection between family, marriage or procreation on the one hand and same-sex relations on the other.

Yet, the Court’s inability to see this connection cannot go unexamined. There was no connection between marriage and same-sex relations, because no state allowed same-sex couples to marry. There was no connection between same-sex relations and family, because in the Court’s eyes two individuals of the same sex who were not related by blood or adoption could not be members of the same family. Further, it is of course true that sodomitical relations, whether between individuals of the same sex or of different sexes, are not directly related to procreation, but that hardly establishes that such relations are criminalizable.

The Bowers analysis was disappointing in a number of respects, since much of the reasoning could have been used to justify laws prohibiting sexual relations between members of different races. Before Loving v. Virginia, various states prohibited interracial marriage, so it could not be argued that there was a connection between interracial coupling and marriage in those states. Further, because the marriages were prohibited, the families were not recognized—indeed, any children produced through such unions would be illegitimate, which might have resulted in those children being disadvantaged in various ways. Finally, even the potentially procreative aspect of such unions would be used in a modified form to justify the prohibition. Just as Virginia had

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65 See notes 56-58 and accompanying text supra.
66 See, for example, notes 85-108; 117-85 and accompanying text infra (discussing appellate cases holding that same-sex marriage is not constitutionally protected).
68 See id. at 191.
69 See note 19 supra (listing states with antimiscegenation laws pre-Loving).
70 See Pickett v. Brown, 462 U.S. 1, 8 (1983) (noting “the history of treating illegitimate children less favorably than legitimate ones”).
claimed that interracial marriage bans should be upheld to avoid the production of allegedly inferior, bi-racial children,\(^{71}\) states prohibiting interracial relations would attempt to justify their bans by appealing to the same theory.\(^{72}\)

In 2003, the United States Supreme Court overruled Bowers in Lawrence v. Texas, taking the unusual step of suggesting not only that Bowers was no longer good law but that the case had been wrongly decided at the time the opinion was issued.\(^{73}\) Lawrence is noteworthy for several reasons. While refusing to address whether same-sex marriage was constitutionally required, the Court went out of its way to explain that when “sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”\(^{74}\) Here, the Court is suggesting that the relationship itself has value independent of the sexual relations.

Justice Scalia in his Lawrence dissent complained that the Court had laid the foundation for a federal constitutional right to same-sex marriage.\(^{75}\) He may well be correct, although not because Lawrence somehow made adultery and bestiality constitutionally protected,\(^{76}\) but because the Court removed a barrier that had falsely been thought to prevent recognition of a right to marry a same-sex partner.\(^{77}\) Now, it was no longer true that same-sex adult, consensual relations could be criminalized, although the Court had already made clear in Zablocki that there was nothing incompatible with a state’s criminalizing sexual relations outside of marriage while protecting such relations within marriage.\(^{78}\)

\(^{71}\) See notes 40-44 and accompanying text supra (discussing Virginia’s justification for prohibiting interracial marriage)

\(^{72}\) See McLaughlin v. Florida, 379 U.S. 184, 195 (1964) (Florida’s “interracial cohabitation law, s 798.05, is likewise valid, it is argued, because it is ancillary to and serves the same purpose as the miscegenation law itself.”).


\(^{74}\) Id. at 567.

\(^{75}\) See id. at 604 (Scalia, J., dissenting).

\(^{76}\) See id. at 599 (Scalia, J., dissenting).

\(^{77}\) Jeffery Hubins, Note, Proposition 22: Veiled Discrimination or Sound Constitutional Law? 23 Whittier L. Rev. 239, 252 (2001) (“[C]ourts have held that marriage is a fundamental right, protected by the right to privacy. As such, this fundamental right to privacy does not protect same-sex marriages because the Supreme Court held in Bowers that the fundamental right to privacy does not extend to homosexual sex.”).

\(^{78}\) See note 55 and accompanying text supra (noting that in Wisconsin at the time sexual relations could only take place legally within the context of marriage).
Traditionally, the Constitution has prioritized relationships over sexual relations—marital relations were found to be constitutionally protected in 1964,\(^79\) and marriage itself was found to implicate a fundamental interest in 1967 in *Loving*. However, the right to have sexual relations outside of marriage was not recognized until 2003 in *Lawrence*.

Almost 50 years ago, Justice Harlan argued that laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.\(^80\)

Justice Harlan is describing a world in which same-sex relations only occur outside the familial context and children are usually born and raised within that context. Whether or not that picture was accurate when offered, it certainly is not accurate now.\(^81\) Members of the same sex are living together as families, sometimes with children and sometimes without.\(^82\) It simply is not true that same-sex relations should somehow be thought to be the negative of marriage and family.

Nonetheless, Justice Harlan is capturing something important when suggesting that family provides the foundation upon which the jurisprudence in this area is based. That insight provided the


\(^80\) See *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting)

\(^81\) See, for example, *A Good Morning for Bonding with Dad*, *Coshocton Trib.* (Coshocton, Ohio) Feb. 6, 2010, 2010 WLNR 2536513

The Ohio Commission of Fatherhood has declared 26.2 percent of households in Ohio are single, and 40.4 percent of children are born to unmarried parents, according to the commission. Nationally, 40 percent of children have not seen their father in the past year, and 50 percent of children have not even seen their fathers home.

\(^82\) See Maura Dolan, *Proposition 8 Trial Turns Its Attention to Children Witness for Opponents of the Gay Marriage Ban Says Those Raised by Same-Sex Couples Are Not Worse Off*, *L.A. Times*, Jan. 16, 2010, at 11 (“Thompson said 2000 census data showed that 33% of lesbian households and 22% of gay male households were raising children.”).
underpinning for Zablocki. Yet, one can build upon a foundation, and thus starting with the family does not mean that the jurisprudence cannot go beyond the family. Adult, consensual relations, even outside of marriage, are sufficiently central to individual identity and autonomy that they should not be subject to state control absent some compelling justification.

Lawrence protects single adults engaging in consensual relations whether or not those individuals are in a committed relationship. Yet, if Justice Harlan is correct that marriage and family are the bedrock of privacy jurisprudence, then one would expect that if relations between individuals engaging in a one-night stand are constitutionally protected, then consensual relations between individuals in a committed relationship are also constitutionally protected. Further, Zablocki counsels that the same-sex relationship itself should be afforded constitutional protection, especially if those individuals are raising children.

The claim here is not that the state must recognize same-sex marriage and LGBT families even if extremely important interests would thereby be severely undermined, but merely that a state refusing to accord such recognition should identify what those substantial or compelling interests are and offer a plausible analysis showing how those interests would be adversely affected were LGBT families given legal recognition. In several cases decided since the Court issued its Lawrence opinion, courts in different jurisdictions have discussed the state justifications for the respective same-sex marriage bans.

III. State Court Analyses of Same-Sex Marriage Bans

Several state appellate courts have recently addressed whether their respective state constitutions protect the right to marry a same-sex partner. The analyses are instructive if only because of the strikingly differing views regarding what might plausibly be thought to promote the state’s legitimate objectives. Ultimately, both the opinions upholding and those striking the local same-sex marriage bans help demonstrate why such bans cannot survive the relevant constitutional test.

a. Arizona

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83 See notes 48-53 and accompanying text supra (discussing Zablocki’s recognition that a constellation of family rights all implicate fundamental interests).
84 See note 74 and accompanying text supra (discussing the Lawrence Court’s point that sexual relations may be one element of an enduring personal bond).
An Arizona appellate court was one of the first to examine the constitutionality of a same-sex marriage ban in light of Lawrence. The Standhart court correctly noted that the Lawrence Court did not hold that the right to marry a same-sex partner was protected by the Constitution. That issue had not been before the Court, so it is unsurprising that the Court had refused to reach the question. Nonetheless, the Arizona court paid too little attention to what the Court said in Lawrence and in other cases, and also paid too little attention to local law to offer a persuasive analysis of the implicated legal issues.

The Standhardt court understood that using the history and traditions test to deny that there was a fundamental right to marry a same-sex partner was undercut by Loving, given Virginia’s longstanding antimiscegenation laws. However, the court tried to distinguish between interracial and same-sex marriage by suggesting that the former was a mere expansion of the traditional scope of the fundamental right to marry, rooted in procreation, whereas recognizing same-sex marriage would involve redefining the term. Yet, by this point in time, it was not as if same-sex marriage was unimaginable and thus might be thought to involve a radical redefinition of marriage. Many had thought that Hawaii would be the first to recognize same-sex marriage in this country years before the question was addressed by the Standhart court, civil unions were already recognized in Vermont, and the Netherlands had already started recognizing same-sex marriages. To expand a definition is to include what had not previously been

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86 Id. at 457.
87 Id. at 458 (noting that “historical custom supported such anti-miscegenation laws”).
88 Id.
89 Regrettably, some commentators still speak as if same-sex marriage involves a radical redefinition of marriage. See, for example, Lynn D. Wardle, The “End” of Marriage, 44 Fam. Ct. Rev. 45, 45-46 (2006) (arguing that “court decisions raise and illustrate the possibility of a radical judicial redefinition of marriage”).
    Members of Congress anticipated that Hawaii would recognize same-sex marriage and that individuals from other states would go to Hawaii, marry their same-sex partners, and then return to their domiciles claiming that their home states had to recognize their marriages. Passage of DOMA allegedly permitted domiciles to refuse to recognize same-sex marriages validly celebrated in Hawaii.
included, and the difference between expansion and redefinition is too slim a reed to base a refusal to recognize something as fundamental as the right to marry one’s life-partner.\(^{93}\)

Distinguishing between interracial and same-sex unions by appealing to procreation to justify affording constitutional protection to the former but not the latter relationship\(^{94}\) is misguided for two distinct reasons. First, the Loving Court tried very hard to avoid discussing the children of interracial couples when discussing why Virginia was precluded from arbitrarily precluding interracial couples from marrying.\(^{95}\) Second, the procreation aspect of marriage, property understood, is a reason to recognize rather than refuse to recognize same-sex marriage.\(^{96}\)

Consider the claim that marriage is necessary to the survival of the human race. Presumably, this is because marriage is to provide a setting in which the young may be produced, raised, and nurtured. Yet, both same-sex and different-sex couples are providing environments in which children can grow and thrive,\(^{97}\) whether those children are biologically related to neither parent, one parent, or both parents. While it is of course true that a child’s biological parents can provide such a setting, others can too, and the human race will continue as long as children are born, and these nurturing homes are provided.\(^{98}\)

The Standhardt court accepted that Arizona had a legitimate interest in promoting procreation and childrearing in stable homes, and that limiting marriage to different-sex couples was rationally related to promoting that end. Yet, it was unclear how the latter promoted the asserted goal. The court recognized both that same-sex couples are having and raising children and that those children would benefit were their parents able to marry.\(^{99}\) Thus, the court accepted that the marital restriction would somehow benefit children when the only evidence presented undermined

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\(^{94}\) See Standhardt, 72 P.3d at 458.

\(^{95}\) See notes 40-44 and accompanying text supra (discussing the Loving Court’s shifting the focus of its analysis away from children).

\(^{96}\) See notes 97-98 and accompanying text infra.

\(^{97}\) See Varnum v. Brien, 763 N.W.2d 862, 874 (Iowa 2009)

Many leading organizations, including the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America, weighed the available research and supported the conclusion that gay and lesbian parents are as effective as heterosexual parents in raising children.


\(^{99}\) Standhardt, 77 P.3d at 462. (“Petitioners more persuasively argue that the State’s attempt to link marriage to procreation and child-rearing is not reasonable because . . . same-sex couples also raise children, who would benefit from the stability provided by marriage within the family.”).
that very conclusion—the same-sex marriage ban would not help children raised by different-sex parents and would positively harm those raised by same-sex parents.100

To add insult to injury, a brief review of Arizona law undercuts the state’s commitment to limiting marriage to those capable of reproducing through their union. For example, Arizona does not bar individuals who are beyond their procreative years from marrying,101 which one might have expected were Arizona only interested in having marriages among those able to reproduce.

The United States Supreme Court has never stated that those beyond their procreative years retain the fundamental right to marry, although the Court would presumably so hold precisely because of the irrationality of limiting marriage that way.102 But that is to say that the fundamental right to marry should not and does not rest on one’s ability to have children.

Suppose that Arizona were to argue that it would preclude the elderly from marrying if only it could, but that the United States Constitution bars the state from doing so. Even if one were to ignore the very low probability that the state would embrace or ever articulate such a policy given the political firestorm that would result among the many retired individuals in Arizona, there is additional reason to doubt that the state values procreation so highly. Arizona, one of several states that bars first cousins from marrying,103 permits such marriage only if the first cousins can show that they are unable to have a child through their union.104

There is no caselaw suggesting that Arizona must provide such an exception as a constitutional matter. This means that Arizona goes out of its way to permit such marriages, which might well be sensible as a public policy matter but is antithetical to the state’s alleged commitment to limiting marriage to those capable of producing children through their union.

The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare.

101 Arizona specifies who is too young to marry, see Ariz. Rev. Stat. § 25-102, but does not have any limitations on those who are too old to marry.

102 Cf. Lawrence, 539 U.S. at 605 (Scalia, J., dissenting) (noting that “the elderly are allowed to marry”).


The state offered and the court accepted other articulations of alleged state policy that were surprising at best. For example, the court implied that the state only had an interest in promoting fidelity among those who might have children. Yet, the state’s criminal prohibition of adultery does not include an exception for those who do not have or, perhaps, cannot have children.

The Standhart court argued that Arizona would be unwise to insist that different-sex individuals show that they were able and willing to procreate before allowing them to marry. The reasons offered included that those not intending to have children at the time of their marriages might later change their minds, those unable to have children at the time of marriages might later be aided by improved medical technology, and that it would be intrusive to find out whether couples had the ability and willingness to have children. In any event, the court noted, couples might later decide to adopt.

The court’s points would be well-taken were the hypothesized requirement really at issue, but rang rather hollow in the context under discussion. While it is of course true that different-sex couples currently unable to have children may be helped by scientific breakthroughs or might decide to adopt, those same points might also be made about same-sex couples. That couples sometimes have a change of heart and later wish to have children is true, but might be said of couples regardless of whether they are composed of individuals of the same sex or of different sexes. The alleged difficulty in asking members of a couple about their ability to have children does not prevent the state from requiring that first cousins establish their inability to have children in some cases. Basically, all of the points made were either undercut by existing practices or might also have been made about the very couples whose denial of access to marriage was being upheld by the court.

Those challenging Arizona’s marriage law were not trying to preclude different-sex couples unable or unwilling to have children from marrying. On the contrary, the challengers were suggesting that those couples should be permitted to marry, as should same-sex couples. The court seemed to accept that the mere possibility that different-sex couples might have children was reason to permit them to marry, but that the actuality of same-sex couples having children to raise was not enough to justify their having the opportunity to marry.

b. Massachusetts

105 See Standhart, 77 P.3d at 461.
107 Standhart, 77 P.3d at 462.
108 Id.
In the same year that the Arizona court upheld a challenge to that state’s same-sex marriage ban, the Supreme Judicial Court of Massachusetts struck down that state’s ban in Goodridge v. Department of Public Health.\(^{109}\) The court noted the numerous benefits that marriage provides,\(^{110}\) and tried to discern whether the state had adequate reasons justifying the exclusion of those wishing to marry a same-sex partner from receiving those benefits. The court rejected that the state had an interest in limiting marriage to those who could procreate through their union, noting that the state promoted adoption and the production of children through noncoital means.\(^{111}\) Indeed, Massachusetts recognizes second-parent adoption,\(^ {112}\) so two members of a same-sex couple might each be recognized as the legal parent of the same child. The court understood that prohibiting the same-sex partners from marrying would inure to the detriment of those adults and to any children that they were raising\(^ {113}\), without providing any offsetting benefits to different sex couples and their children.\(^ {114}\)

A surprising claim in one of the Goodridge dissenting opinions was that reserving marriage for different-sex couples was rationally related to the state’s desire to provide an optimal setting in which children might be raised.\(^ {115}\) Suppose that one brackets that children raised by same-sex parents are thriving and that various national organizations whose mission is to promote the interests of children have recognized the parenting abilities of members of the LGBT community.\(^ {116}\) Even so, the position offered in the Goodridge dissent imposes opportunity costs on the children raised by same-sex couples, i.e., a denial of those tangible and intangible benefits that would have accrued had the parents been permitted to marry, without any offsetting benefits for anyone else. But it makes no sense to justify a denial of the parents’ right to marry by appealing to the interests of children when the denial harms rather than helps children.

**c. Indiana**

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\(^{110}\) Id. at 955-56.

\(^{111}\) Id. at 962.

\(^{112}\) See Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).

\(^ {113}\) Goodridge, 798 N.E.2d at 964.

\(^ {114}\) Id.

\(^ {115}\) See id. at 997 (Cordy, J., dissenting).

\(^{116}\) See note 97 supra.
A new justification was offered for limiting marriage to different-sex couples in *Morrison v. Sadler*.* 117* The Indiana court recognized that many same-sex couples are having and raising children. However, the court noted, there is a key difference between same-sex and different-sex couples, namely, the ease of procreation.

Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. “Natural” procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.\(^{118}\)

The court suggested that this difference in the ways that couples might reproduce justified the state’s promoting the institution of different-sex marriage so as to increase the likelihood that children would be born within rather than outside of wedlock. The court apparently believed that the great emotional and financial investment associated with adoption or assisted reproduction would make it sufficiently likely that the couple would stay together with or without marriage that the state did not need to provide the benefits of marriage to such couples.\(^{119}\)

This is a very unusual view of the purpose of marriage, which is allegedly an institution designed to provide stability for children only in those cases where the stability would likely not exist but for the marriage. The same rationale would support not permitting the marriage of two individuals of different sexes if it could be shown that those individuals were so committed to each other that only death would make them part and would also support not permitting the infertile or elderly to marry.\(^{120}\) Unsurprisingly, this view of the purpose of marriage does not reflect Indiana public policy more generally. For example, like Arizona, Indiana limits marriage to first cousins who

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118 *Id.* at 23.

119 *See id.* at 24

What does the difference between “natural” reproduction on the one hand and assisted reproduction and adoption on the other mean for constitutional purposes? It means that it impacts the State of Indiana’s clear interest in seeing that children are raised in stable environments. Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the “protections” of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.\(^{120}\) *See id.* at 36 (Friedlander, J., concurring in result) (“Pursuant to this rationale, the State presumably could also prohibit sterile individuals or women past their child-bearing years from marrying.”)
cannot have a child through their union. One would not expect a state committed to affording marriage only to those who might accidentally have children to make an express exception only for those first cousins who cannot have a child together. While there might be public policy rationales to justify such an exception, one would not find them in the Morrison opinion.

According to the Morrison court, Indiana believes that the difficult part of parenting is in producing rather than in raising children. If, however, raising children involves numerous challenges, then the state has an interest in promoting couples staying together even when their relationship is rather stable when the children are produced. All couples may face trying times during the course of their relationship. If marriage encourages couples to stay together and, at least as a general matter, the parents staying together will provide increased stability for the children, then the state has an interest in recognizing both same-sex and different-sex marriage.

Ironically, one infers from the Morrison opinion that the right to marry a same-sex partner would be more likely to be recognized if only same-sex couples would be less responsible when having children. Consider a lesbian who approaches males whom she does not know and asks them to provide sperm to be used in artificial insemination. She does not want to raise the child with any of these strangers and, indeed, takes steps to assure everyone’s anonymity so that the donor cannot later assert parental rights. The Morrison rationale suggests that the state should recognize the right to marry a same-sex partner were this kind of scenario more prevalent, because the state would then be promoting her relationship with her female partner so that the child could be raised in a stable, responsible environment. But it would be absurd for Indiana to structure its right to marry jurisprudence to

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121 See note 104 and accompanying text supra.
123 See Morrison, 821 N.E.2d at 25.
124 But see In re Marriage Cases, 183 P.3d 384, 432 (Cal. 2008), superseded by constitutional amendment as stated in Strauss v. Horton, 207 P.3d 48 (Cal. 2009)
    None of the past cases discussing the right to marry - and identifying this right as one of the fundamental elements of personal autonomy and liberty protected by our Constitution - contains any suggestion that the constitutional right to marry is possessed only by individuals who are at risk of producing children accidentally, or implies that this constitutional right is not equally important for and guaranteed to responsible individuals who can be counted upon to take appropriate precautions in planning for parenthood.
incentivize or reward irresponsible parenting. The kind of analysis offered by the Morrison court regarding the purpose of marriage undercuts individual interests, societal interests, and the integrity of the courts.

d. New York

The irresponsible procreation argument might seem so obviously specious that it should not be mentioned. Both planned and unplanned children benefit from stable environments in which the children can thrive, and the state should not arbitrarily restrict those couples receiving incentives to provide such environments. Surprisingly, the irresponsible procreation argument was cited with approval in Hernandez v. Robles by New York’s highest court when analyzing that state’s same-sex marriage ban. The court reasoned that the legislature could find that different-sex “relationships are all too often casual or temporary . . . [and] that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born.” Yet, it is presumably an important function of marriage to provide permanence for children even where the adults’ relationship is not casual. Any number of factors including illness or loss of employment might put added stress on a relationship, so the state should not limit its focus to only those in casual relationships.

The Hernandez court reasoned that the legislature “could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.” Here, the court was addressing a situation not before the court, namely, if the legislature could recognize different-sex marriages or same-sex marriages but not both, which should be chosen? As Chief Judge Kaye pointed out in dissent, however, there was no need to choose; there were enough marriage licenses for everyone.

The Hernandez court accepted an argument that the Goodridge court rejected, namely, that the legislature might have reserved marriage for different-sex couples, believing that it was better for children to grow up with a father and a mother. But this rationale simply does not make sense in this context. New York, like

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126 855 N.E.2d 1 (N.Y. 2006).
127 Id. at 7.
128 See Beth M. Erickson, Therapeutic Mediation: A Saner Way of Disputing, 14 J. Am. Acad. Matrim. Law, 233, 238 (1997) (discussing “life stressors such as relocation, illness, job loss, birth or death of a child, and other episodes that impinge on the couple from the outside”).
129 Hernandez, 855 N.E.2d at 7.
130 Id. at 30 (Kaye, C.J., dissenting).
131 Id. at 7.
Massachusetts, permits second-parent adoptions. Precluding same-sex couples from marrying is not preventing same-sex couples from raising children; it is merely denying those families the benefits that marital status might have afforded. A same-sex marriage ban does not increase the number of children born into marriages; on the contrary, it increases the number of children being raised in a non-marital context.

e. Washington

The Washington Supreme Court offered reasoning that tracked the reasoning offered by the New York court:

[T] he legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children's biological parents. Allowing same-sex couples to marry does not, in the legislature's view, further these purposes.

Yet, the court never explained how the legislature could hold these views. Washington also recognizes second-parent adoption, so the state obviously does not object to LGBT parenting. No argument was offered to suggest that limiting marriage to different-sex couples would somehow induce more couples to have children while married. Nor was any evidence presented some how demonstrating that different-sex couples would be more likely to divorce were same-sex couples allowed to marry. But without some kind of account suggesting how restricting marriage would promote marriage among different-sex couples or promote procreation within marriage, it is not rational to believe the same-sex marriage prohibition would promote these ends.

The Washington court is correct that permitting same-sex couples to marry would not directly promote the interests of those children being raised by their biological parents. But no one would seriously claim that legislatures

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132 See note 115 and accompanying text supra (discussing why Justice Cordy’s Goodridge dissent was unpersuasive).
133 See Jacob, 660 N.E.2d 397 (N.Y. 1995); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).
134 Andersen v. King County, 138 P.3d 963, 969 (Wash. 2006) (emphasis added).
135 Id. at 982 (“plaintiffs correctly say, same-sex couples can and do legally procreate through assisted reproduction and adoption”). See also Vanessa A. Lavelle, The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies between Marriage and Adoption Cases, 55 UCLA L. Rev. 247, 249-50 (2007) (“Courts in Massachusetts, New York, and Washington all allow same-sex couples to legally adopt children.”).
136 Cf. Dale Carpenter, A Traditionalist Case For Gay Marriage, 50 S. Tex. L. Rev. 93, 103 (2008) (“Eighteen years after recognizing same-sex relationships in Scandinavia, there are higher marriage rates for heterosexuals, lower divorce rates.”).
are solely concerned with those members of the next generation being raised by both of their biological parents, given the huge numbers of children who do not fall into that narrow category, and permitting same-sex couples to marry would promote the interests of children more generally. Promoting the interests of children more generally indirectly promotes the interests of children being raised by their biological parents, because society benefits as a general matter when children benefit. Any legislature ignoring those children not being raised by both of their biological parents is ignoring a large percentage of the state’s children and cannot be thought to have the best interests of the state at heart.

The Washington Supreme Court noted that the legislature could have found that “encouraging marriage for opposite-sex couples who may have relationships that result in children is preferable to having children raised by unmarried parents.” But those challenging the Washington ban were not questioning whether it was better for children to be raised by married parents; on the contrary, they were instead questioning whether the legislature could have found that it would be better for the children of same-sex parents to be raised by unmarried parents. If not, then the court should have examined whether the legislature could have found that the benefits of such a ban for the parents of children in families where the parents are of different sexes could plausibly be thought to outweigh the costs to the families where both of the adults were of the same sex. If same-sex marriage bans do not promote the interests of children raised by different-sex parents and positively undermine the interests of children raised by same-sex parents, then the legislature could not credibly have believed that the same-sex marriage ban somehow promoted the interests of children or society more generally.

The Washington court seemed to understand that the legislative classification was not closely tied to the desired ends. The court explained that the link between opposite-sex marriage and procreation is not defeated by the fact that the law allows opposite-sex marriage regardless of a couple's willingness or ability to procreate. The facts that all opposite-sex couples do not have children and that single-sex couples raise children and have

138 Cf. Irene D. Johnson, A Suggested Solution to the Problem of Intestate Succession in Nontraditional Family Arrangements: Taking the “Adoption” (and the Inequity) out of the Doctrine of “Equitable Adoption,” 54 St. Louis U. L.J. 271, 307 (2009) (“Often, especially in lower-income and minority communities, children are raised in family units that do not include their biological parents.”).
139 Andersen, 138 P.3d at 982.
children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis.140

But the questions at hand involves the work that the link between marriage and procreation is supposed to perform. Even if many different-sex, married couples cannot or do not choose to have children,141 it is fair to suggest that many married couples do have children. It might indeed be rational for a legislature to encourage different-sex couples to marry in the belief that the adults, the children, and society itself would thereby benefit. Yet, a separate question is whether these same benefits plus others would be accrued were marriage open not only to different-sex couples but same-sex couples as well. The difficulty with the Washington statute was not merely that it was somewhat over- or under-inclusive, but that the state had adopted a policy that harmed the individuals it was claiming to help without providing any compensating benefits to anyone else.

f. New Jersey

In Lewis v. Harris142 in which New Jersey’s same sex marriage ban was challenged, the New Jersey Supreme Court recognized both that same-sex couples were forced to endure various “social indignities and economic difficulties” because of the inability to marry143 and that promoting procreation and optimal parenting could not credibly be used to justify restricting marriage to different-sex couples.144 However, the court rejected that the right to marry a same-sex partner was a fundamental right145 in light of the history and traditions test.146 As Chief Justice Poritz pointed out in her concurrence and dissent, the court’s conclusion was pre-determined by the way the question was framed. By asking whether the right to marry a same-sex partner is deeply rooted in the nation’s history, the court framed the question so narrowly that it could not help but answer in the negative.147 But framing the relevant question narrowly would also have resulted in others being denied the right to marry, e.g., the

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140 Id. at 983.
141 Melissa B. Neely, Indiana Proposed Defense of Marriage Amendment: What Will It Do and Why Is It Needed, 41 Ind. L. Rev. 245, 268 -269 (2008) (“[M]any marriages are childless; U.S. Census data for 2005 indicates that approximately 21% of married couples between fifteen and forty-four do not have children.”).
142 908 A.2d 196 (N.J. 2006).
143 See id. at 202.
144 Id. at 205-06.
145 Id. at 200.
146 Id. at 208.
147 See id. at 228 (Poritz, C.J., concurring and dissenting).
Lovings.\textsuperscript{148} Had the question instead been “whether there is a fundamental right to marriage rooted in the traditions, history and conscience of our people, there is universal agreement that the answer is ‘yes.’”\textsuperscript{149}

Even if there was no fundamental right to marry a same-sex partner protected by the New Jersey Constitution, a separate question was whether the state constitution precluded the state from refusing to accord same-sex couples the tangible rights and benefits associated with marriage.\textsuperscript{150} The court found the state’s refusal violated state constitutional equal protection guarantees,\textsuperscript{151} and held that the legislature either had to open up marriage to same-sex couples or had to create a separate civil union status.\textsuperscript{152}

The Lewis Court suggested that “families are strengthened by encouraging monogamous relationships, whether heterosexual or homosexual,”\textsuperscript{153} and the court could not “discern any public need that would justify the legal disabilities that now afflict same-sex domestic partnerships.”\textsuperscript{154} Yet, it is of course true that same-sex couples in New Jersey do not have special needs that couples in other states do not have. On the contrary, all couples, whether or not raising children, stand to benefit from having the opportunity to marry. If, indeed, a particular kind of marriage would be harmful to society, then the state should offer some kind of plausible account of what the harm would be and how the prohibition prevents the harm. But without such a showing, it is difficult to understand how a state can justify harming LGBT families and society as a whole by denying same-sex couples the right to marry.

g. Maryland

In Conaway v. Deane,\textsuperscript{155} the Maryland Supreme Court analyzed the constitutionality of that state’s same-sex marriage ban. The court’s analysis, like that offered by the New Jersey Supreme Court,\textsuperscript{156} focused on whether the right to marry a same-sex partner was deeply rooted in the state’s history and traditions,\textsuperscript{157} notwithstanding that none of the right to marry cases were predicated on a preexisting history or tradition of recognizing the particular marriage at issue. Thus, there was no history and tradition in Virginia of having a right to marry someone of another

\textsuperscript{148} See note 21 and accompanying text supra
\textsuperscript{149} Lewis, 908 A.2d at 228 (Poritz, C.J. concurring and dissenting).
\textsuperscript{150} Id. at 220
\textsuperscript{151} Id. at 220 -21.
\textsuperscript{152} Id. at 224 (“the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision”).
\textsuperscript{153} Id. at 218
\textsuperscript{154} Id.
\textsuperscript{155} 932 A.2d 571 (Md. 2007)
\textsuperscript{156} See note 146 and accompanying text supra.
\textsuperscript{157} Conaway, 932 A.2d at 617.
race or history;\textsuperscript{158} no history and tradition in Missouri of incarcerated individuals being permitted marry,\textsuperscript{159} especially when it was claimed that prison security might thereby be threatened;\textsuperscript{160} and no history and tradition in Wisconsin of permitting individuals to marry even when they had already had children not in their custody whom they could not support.\textsuperscript{161}

The Conaway court claimed that almost all of the federal right to marry cases were focused on producing children. Yet, Loving was not, since the Court nowhere mentions children and seemed determined to shift the focus away from the children that might be produced through the union of the parties.\textsuperscript{162} Further, as the Maryland court recognized, Turner did not focus on procreation.\textsuperscript{163} Even Zablocki, which involved a man who wanted to marry his pregnant fiancé, did not focus on producing children in particular but, instead, on a number of aspects of families including the production and raising of children.\textsuperscript{164}

The perceived focus on children in the federal marriage cases allegedly convinced the Maryland court that the relevant issue was the “inextricable link’ between marriage and procreation,”\textsuperscript{165} notwithstanding that some different-sex couples are neither willing nor able to have children and that some same-sex couples are having and raising children.\textsuperscript{166} The court recognized that its analysis might seem dated, given the changing demographics of the

\textsuperscript{158} See Loving, 388 U.S. at 6 (“Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.”).

\textsuperscript{159} On the contrary, there was a history of refusing to permit the marriages of female inmates. See Turner, 482 U.S. at 99 (“the Missouri prison system operated on the basis of excessive paternalism in that the proposed marriages of all female inmates were scrutinized carefully even before adoption of the current regulation”). Further, in a related case issued after Loving, the Court in Butler v. Wilson, 415 U.S. 953 (1974) had summarily affirmed Johnson v. Rockefeller, 365 F.Supp. 377 (C.D. N.Y. 1973) in which a federal district court had upheld New York’s prohibiting prisoners with life sentences from marrying).

\textsuperscript{160} See Turner, 482 U.S. at 97 (“Petitioners have identified both security and rehabilitation concerns in support of the marriage prohibition. The security concern emphasized by petitioners is that “love triangles” might lead to violent confrontations between inmates.”).

\textsuperscript{161} The Wisconsin statute, Wis. State Ann. § 245.10, was based on previous statutes going back almost 20 years. See West Wis. Stat. Ann. 845 (2009), suggesting that the statute was derived from L.1959 c. 595 § 17. See also In re Ferguson's Estate, 130 N.W.2d 300, 302 (Wis. 1964)

This section was originally created by ch. 595, sec. 17, Laws of 1959, to become effective January 1, 1960. In its then form it provided no license to marry should be issued when it appeared that either applicant had a minor of a previous marriage not in his custody and which he was under obligation to support by court order or judgment without the written permission of a judge of a court having divorce jurisdiction in the county in which the license was applied for.

\textsuperscript{162} See notes 40-44 and accompanying text supra (discussing the Loving Court’s shifting the focus away from the children that might be born of interracial marriages).

\textsuperscript{163} Conaway, 932 A.2d at 621.

\textsuperscript{164} See notes 48-53 and accompanying text supra (noting Zablocki’s focus on various family matters).

\textsuperscript{165} Conaway, 932 A.2d at 630.

\textsuperscript{166} Id. at 631.
American family. Yet, given these changing demographics which include the increasing number of married couples choosing not to have children and the increasing number of children raised by same-sex parents, one might well wonder how to spell out this inextricable connection discussed by the court. For example, insofar as the link involves the recognition that marriage provides a setting in which children might thrive, then one would have expected the court to have held that the connection between marriage and the next generation provided the basis for striking down rather than upholding the Maryland law.

It may well be that the court was not really convinced by the inextricable link to procreation argument but instead was simply following the example that the Court had allegedly set. The Conaway court noted that Lawrence had not expressly recognized a fundamental right to engage in same-sex relations and hypothesized that the Court had not “intended to confer such status on the public recognition of an implicitly similar relationship.” Yet, the Maryland court failed to mention that the Lawrence Court had supported its holding by discussing many of the important recent right to privacy cases including Griswold v. Connecticut, in which the Court recognized the right of married individuals to have access to contraception, Eisenstadt v. Baird, in which the Court recognized the right of unmarried individuals to have access to contraception, Roe v. Wade, in which the Court recognized a right to be free from unwarranted government interference in one’s attempt to secure an abortion, Carey v. Population Services, in which the Court struck down certain limitations on the sale and distribution of contraceptives to minors, and Planned Parenthood of Southeastern Pennsylvania v. Casey, in which the Court “confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education.” If all of these cases involved rights

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167 Id. at 632
168 See, for example, Keith Lawrence, Middle America Slipping Away, Messenger-Inquirer (Owensboro Ky.), Nov. 22, 2009, available at 2009 WLNR 23550550 (discussing a demographer’s prediction that in the next census “married couples with no children will be the prevalent household”).
169 See Sally Jacobs, What Can Social Science Add to the Gay Marriage Debate? Not Much So Far, Boston Globe, Mar. 9, 2004, at C1 (discussing the children of gay and lesbian parents - who number between 6 and 14 million in the United States, according to various studies”).
170 Conaway, 932 A.2d at 626.
171 381 U.S. 479 (1965).
176 Lawrence, 539 U.S. at 573-74.
falling within the right to privacy but adult, consensual relations did not, then one might rightly ask, “Why are those cases being cited as support for protecting an interest that does not fall within the right to privacy?”

The Lawrence Court neither expressly designated the right to have non-marital relations with a same-sex partner as a fundamental right nor expressly designated such relations as implicating a mere liberty interest subject to rational basis review. Instead, the Court noted that the sodomy statute “furthers no legitimate interest which can justify its intrusion into the personal and private life of the individual.”

The language here is important to examine. The Court refrains from saying that the state has no legitimate interest at all in regulating non-marital conduct, but instead suggests that the state has no legitimate interest that justifies the intrusion. The Court’s description is compatible with a reading suggesting that adult, consensual, intimate relations implicate more than a mere liberty interest.

Consider the statute at issue in Zablocki, where Wisconsin was trying to restrict the marriage rights of indigent noncustodial parents. The state had a legitimate interest at stake, namely, protecting the public fisc. The difficulty was that Wisconsin’s legitimate interest could not justify the limitation on Redhail’s personal life. It would have been quite accurate to say that Wisconsin did not have a legitimate interest that justified the burden imposed, notwithstanding Wisconsin’s clearly legitimate interest in conserving scarce resources. Basically, Wisconsin’s legitimate interests in Zablocki were not “sufficiently important” to justify the prohibition.

Ironically, even if Lawrence is read as protecting a mere liberty interest, the decision nonetheless supports same-sex marriage being constitutionally protected. The Lawrence Court suggested that the Constitution precludes states from criminalizing voluntary, adult, consensual relations. What justification could be offered for such a statute? Arguably, by criminalizing such relations, the state is providing couples with an incentive to marry, where their voluntary sexual relations would be legal. Promoting marriage is considered a legitimate state interest, and it seems reasonable to believe that some might be induced to marry were voluntary non-marital relations

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177 Id. at 578.
178 See Zablocki, 434 U.S. at 388.
179 See Lawrence, 539 U.S. at 604 (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”).
180 Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008) (“Lawrence was a substantive due process decision that recognized a right in all adults, regardless of sexual orientation, to engage in certain intimate conduct.”)
criminalized. Basically, the Lawrence Court is suggesting that the state’s legitimate interest in promoting marriage is not sufficiently important to justify its criminalizing non-marital relations.

Here is at least one of the difficulties posed by Lawrence for those opposing same-sex marriage. Suppose that the decision is read as only implicating rational basis scrutiny. If that is so, then it must be claimed that the state’s promoting marriage by criminalizing consensual, non-marital relations either is not a legitimate goal or, perhaps, the state’s chosen method is not rationally related to the promotion of that goal. But consider, instead, how excluding same-sex couples from marriage is supposed to promote marriage. It does not seem credible to claim that different-sex couples are less likely to get or remain married because same-sex couples are also allowed to marry. But if promoting different-sex marriage is the goal, and it is more credible to believe that different-sex marriage would be promoted by criminalizing non-marital relations than by maintaining a same-sex marriage ban, then Lawrence counsels that same-sex marriage bans are constitutionally infirm even using the rational basis test.

Suppose, instead, that adult, voluntary, non-marital relations (including such relations between same-sex partners) fall within the right to privacy and thus trigger close scrutiny. Then, presumably, the same would be said for marriage (even between same-sex partners), which would also mean that the state will have great difficulty justifying its ban.

One of the noteworthy omissions in the Lawrence Court’s recounting of the privacy cases involved its utter refusal to discuss the marriage cases—Loving, Zablocki, and Turner—when discussing privacy rights. Further, same-sex marriage opponents might point out that the Lawrence Court made quite clear that it was not discussing same-sex marriage. Yet, the claim here is not that Lawrence held that same-sex marriage must be recognized, but that its reasoning supports that conclusion.


182 See, for example, Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 480 (Conn. 2008) (“It is only because the state has not advanced a sufficiently persuasive justification for denying same sex couples the right to marry that the traditional definition of marriage necessarily must be expanded to include such couples.”).

183 Lawrence, 539 U.S. at 573-74.

184 See id. at 578 (“The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”)

185 See Lawrence, 539 U.S. at 604 (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”).
That the Lawrence Court refused to address the constitutionality of same-sex marriage bans does not establish their constitutionality. On the contrary, past experience indicates that the Court’s refusal to address same-sex marriage might cut the other way.

In McLaughlin v. Florida, the Court struck down Florida’s imposing a more severe penalty on interracial compared to intra-racial non-marital relations. The state had claimed that the statute at issue promoted the state’s anti-miscegenation law. The Court rejected that argument but expressly declined to reach “the question of the validity of the State’s prohibition against interracial marriage. Three years later, the Loving Court struck down anti-miscegenation laws.

The same-sex marriage opponent will not save his position by noting that Lawrence involved a criminal statute. McLaughlin involved a criminal statute and although Loving involved both criminal and civil statutes, there was no suggestion in Loving that the case would have been decided differently had Virginia merely refused to recognize the validity of the Loving’s marriage. On the contrary, the Loving Court made quite clear that Virginia’s attempt to ban interracial marriages simply could not stand, at least in part, because the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women].”

h. California

In In re Marriage Cases, the California Supreme court addressed a relatively narrow question, namely, whether the state was violating state constitutional guarantees by reserving marriage for different-sex couples and offering same-sex couples virtually all of the benefits of marriage through domestic partnerships. Yet, opening up marriage to same-sex couples would not deprive different-sex couples of any benefits, and the state’s vital interests in promoting marriage for the sake of the next generation would be served rather than undermined by

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187 Id. at 186.
188 See id. at 195
189 Id.
190 See Loving, 388 U.S. 4 n.3 (quoting the statute making interracial marriages void) and id. at 4 (quoting the criminal statute pertaining to interracial marriages).
191 Id. at 12.
193 See id. at 397-98 .
194 Id. at 401.
permitting same-sex couples to have access to that institution.\textsuperscript{195} The right to marry has never been understood to be limited to those who can procreate through their union,\textsuperscript{196} and the court noted the irony in justifying restrictions on marriage by appealing to the possibility of accidental procreation, as if it made sense to burden individuals for being responsible when making decisions about when to have and raise a child.\textsuperscript{197}

The California court’s points are of course applicable in a jurisdiction not offering the option of domestic partnership. Indeed, they are all the more telling in such a jurisdiction, because the denial of marriage recognition would be imposing an even greater burden on the LGBT community, and that denial still would not have afforded different-sex couples and their families or society any benefits.

\textit{i. Connecticut}

The Connecticut Supreme Court addressed an issue similar to the one faced by the California court—the question addressed in \textit{Kerrigan v. Commissioner of Public Health}\textsuperscript{198} was whether the state’s creating a separate status of civil unions for same-sex couples violated state constitutional guarantees.\textsuperscript{199} The state’s recognition that sexual orientation does not affect one’s ability to parent played an important role in the court’s analysis.\textsuperscript{200} Basically, the state could not offer sufficient justification for its restriction of marriage,\textsuperscript{201} notwithstanding the state’s affording the tangible benefits of marriage to couples who had entered into civil unions.\textsuperscript{202}

In his \textit{Kerrigan} dissent, Justice Borden worried that to “change the law of marriage by expanding it to include same sex couples is to change the institution that the law reflects.”\textsuperscript{203} But it is not clear how the institution is changed by this expansion, just as it is not clear how the institution was changed by its expansion to include interracial couples. While some couples are permitted to marry who could not have married previously, that does not establish that the institution itself has changed.

The \textit{Goodridge} Court wrote:

\begin{itemize}
\item See id. at 423.
\item Id. at 431.
\item Id.
\item 957 A.2d 407 (Conn. 2008).
\item Id. at 415.
\item Id. at 435 (“It is highly significant, moreover, that it is the public policy of this state that sexual orientation bears no relation to an individual’s ability to raise children.”).
\item Id. at 480.
\item Id. at 418.
\item Id. at 503 (Borden, J., dissenting).
\end{itemize}
Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits.  

But this understanding of marriage is not at all changed by affording same-sex couples access to the institution. Indeed, different-sex marriage has not been destroyed in Massachusetts now that same-sex couples are also allowed to marry, and there is no reason to think that there would be adverse effects on the institution of marriage in any other state in which same-sex couples were accorded access to that institution.

j. Iowa

The most recent state supreme court decision examining the right to marry was issued by the Iowa Supreme Court in Varnum v. Brien. The court noted that the societal benefits that accrue when different-sex couples are permitted to marry would also accrue were same-sex couples permitted to marry, e.g., the benefits that are thereby provided the children that the married same-sex couples might be raising. Indeed, the state’s same-sex marriage ban neither promoted the interests of children raised by same-sex parents nor the interests of children raised different-sex parents, and so could not be justified using a child’s best interests rationale. Further, the court gave short shrift to the claims that restricting marriage would somehow promote more procreation among different-sex couples or would somehow promote stability among different-sex couples. Basically, the Iowa Supreme Court rejected that the state had offered an adequate justification for its restrictions on marriage.

While the Iowa Supreme Court struck down that state’s same-sex marriage ban using heightened scrutiny, the court’s analysis suggests that the ban should not have withstood rational basis scrutiny. For example, when examining the claim that parenting by different-sex couples is optimal for children, the court noted the abundance of

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204 Goodridge, 798 N.E.2d at 948.
205 See Harold P. Southerland, “Love for Sale” --Sex and the Second American Revolution, 15 Duke J. Gender L. & Pol’y 49, 76 (2008) (“Those who oppose gay and lesbian marriage cannot seem to realize that these unions are in a real sense “traditional” in a way that many of today’s heterosexual marriages are not, and that they may actually be more consonant with the family values the opponents claim to espouse.”).
206 763 N.W.2d 862 (Iowa 2009).
207 See id. at 883.
208 Id. at 900.
209 See id. at 901-02.
210 See id. at 896.
evidence suggesting that children are doing equally well whether with same-sex or different-sex parents. After noting that some commentators nonetheless sincerely claim that children do better with different-sex parents, the court noted that such opinions were “were largely unsupported by reliable scientific studies.”

Even were studies to support such a contention, however, that would not justify restricting marriage to different-sex couples. As the court pointed out, same-sex couples already were raising children and would continue to do so, and thus restricting marriage would not further the state’s alleged goals. Restricting marriage would only affect children if “people in same-sex relationships [would] choose not to raise children without the benefit of marriage” and if children would be “adopted by dual-gender couples who would have been adopted by same-sex couples but for the same-sex civil marriage ban.” But there was no reason to think that a same-sex marriage ban would produce such results. Indeed, the court might have added a further point. Children adopted by members of the LGBT community tend to be either a partner’s child or a hard-to-place child. If indeed, same-sex couples are being deterred from adopting because of their inability to marry, then this may well mean that a child who might otherwise have been placed will now simply not be accorded the benefits of permanent placement in a loving home. No state seriously interested in its children should want such an outcome.

IV. Conclusion

The right to marry has already been recognized as falling within the right to privacy—the only question confronting those courts analyzing whether same-sex marriage is constitutionally protected is whether the right to marry includes the right to marry a same-sex partner. The analyses offered are often remarkably disappointing. The Court has never suggested that marriage rights are somehow tied to the ability and willingness to have children

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211 Id. at 899 (“Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents.”)

212 Id.

213 Id.

214 Id. at 901.

215 Id.

216 Id.

through the parties’ union. Further, it is implausible to think that any court would ever assert such a tie in any context other than in an attempt to justify a same-sex marriage ban.

Traditionally, the right to marry has been given greater protection than the right to engage in adult consensual relations outside of marriage, at least in part, because the right to marry has been associated with a variety of family functions including having and raising of children, even though it is of course true that non-marital relations can also result in the production of children. Yet, if non-marital (including same-sex) relations are constitutionally protected, it is difficult to see why same-sex marriage should not also be protected, especially because permitting states to regulate non-marital relations would more plausibly promote marriage than would restricting access to marriage to different-sex couples.

Courts upholding same-sex marriage bans have deferred to the legislature’s alleged judgment that marriage restrictions would somehow promote marriage among different-sex couples or somehow advance the interests of their children when no plausible connection could be made between the restriction and the goals to be promoted. Yet, the very goals articulated by these courts were themselves illuminating, because the courts implicitly assumed that same-sex couples and their children did not have interests that should be weighed in the balance. That very focus makes clear that members of LGBT community are being treated as non-persons in these analyses, which alone makes such laws constitutionally suspect.

If it could be shown that opening up marriage to same-sex couples would impose significant costs on different-sex couples, then a more difficult cost-benefit analysis would have to be performed, which included justifications for imposing burdens on one group to benefit another. But maintaining such restrictions when they do not benefit anyone and instead harm both the families of those precluded from marrying and society as a whole is simply unconscionable, and courts upholding such bans are, in the words of the Connecticut Supreme Court, guilty of ignoring their own responsibility.218

218 Kerrigan, 957 A.2d at 480-81 (“Contrary to the suggestion of the defendants, therefore, we do not exceed our authority by mandating equal treatment for gay persons; in fact, any other action would be an abdication of our responsibility.”).